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Supreme Court of the United States

October Term, 1950.

No. 5, Original.

STATE OF NEW JERSEY,
Complainant,

against

STATE OF NEW YORK and CITY OF NEW YORK,
Defendants,

COMMONWEALTH OF PENNSYLVANIA,
Intervenor.

MEMORANDUM IN SUPPORT OF THE MOTION OF THE CITY OF PHILADELPHIA FOR LEAVE TO INTERVENE AND TO FILE AN ANSWER TO THE PETITION OF THE CITY OF NEW YORK FOR MODIFICATION OF THE DECREE.

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INDEX TO MEMORANDUM.

	Page
STATEMENT	1
STATUS OF THE LITIGATION	2
ARGUMENT	3
Summary of Argument	3
I. The City of Philadelphia Has a Special Interest in This Proceeding Which Justifies Its Intervention and Which Cannot Be Adequately Represented by Pennsylvania	3
(A) Pennsylvania's status as *parens patriae* does not create an exclusive prerogative in the State to represent Philadelphia's interest	7
(B) The limited intervention of Philadelphia in this proceeding will not create a precedent for the intervention of other municipalities or private citizens	9
II. The Eleventh Amendment Does Not Prohibit Philadelphia's Intervention	10
CONCLUSION	11

TABLE OF CASES CITED.

	Page
Clark v. Barnard, 108 U. S. 436 (1913)	10
Georgia v. Pennsylvania Railroad Co., 324 U. S. 439 (1945)	7
Georgia v. Tennessee Copper Co., 206 U. S. 230 (1907)	7
Kentucky v. Indiana, 281 U. S. 163 (1929)	7
Lincoln County v. Luning, 133 U. S. 529 (1890)	10
Missouri v. Fiske, 290 U. S. 18 (1933)	10
Missouri v. Illinois and the Sanitary District of Chicago, 180 U. S. 208 (1901)	7
North Dakota v. Minnesota, 263 U. S. 365 (1923)	7
Pennsylvania v. West Virginia, 262 U. S. 553 (1923)	7
Port of Seattle v. Oregon & Washington Railroad Co., 255 U. S. 56 (1921)	10
State of New Jersey v. State of New York, 280 U. S. 528 (1929)	11
Wheeler v. Philadelphia, 77 Pa. 338 (1875)	8
Wisconsin v. Illinois, 279 U. S. 821 (1928)	7

STATUTES CITED.

	Page
Act of February 2, 1854, P. L. 21, § 37	4
Act of April 6, 1848, P. L. 359	4
Act of April 2, 1949 (First Class City Home Rule Act) P. L. 665, 53 P. S. (Supp.) § 3421.1	8
Act of April 5, 1849, P. L. 344	4
Constitution of Pennsylvania, Article XV, Section 1	8
U. S. Constitution, Eleventh Amendment	10

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STATEMENT

This memorandum is filed in support of the Motion of the City of Philadelphia for Leave to Intervene in this proceeding and to file an answer to the Petition of the City of New York which seeks a modification of the decree providing for an additional allotment of water from the Delaware River and its tributaries.

STATUS OF THE LITIGATION

The issue now before this Court is drawn between the City of Philadelphia, which seeks leave to intervene in this proceeding to present evidence in its own behalf and to participate in all proceedings and hearings, and all of the original parties to this action, the State of New Jersey, the State of New York, and the City of New York, and the Intervenor, the Commonwealth of Pennsylvania, all of whom oppose Philadelphia's intervention. Their opposition rests upon two principal grounds: (1) As *parens patriae* Pennsylvania has the exclusive prerogative of representing all of its citizens, including Philadelphia, irrespective of any special interest that Philadelphia may have; and (2) By the Eleventh Amendment of the Constitution of the United States, Philadelphia is prohibited from becoming a party in what amounts to a suit against the State of New York without its consent. Supplementally, they urge that if Philadelphia is permitted to intervene, the door would be opened wide to the intervention of other municipalities and private corporations.

ARGUMENT

Summary of Argument

The City of Philadelphia, as proprietor of a vast municipal water and sewage disposal system which depends upon the adequacy of the flow of the Delaware River, has a special interest in this proceeding which justifies its intervention, especially since this Court is here concerned with the apportionment on equitable principles of the waters of the Delaware. The presence of the Commonwealth of Pennsylvania as an intervenor in its capacity as *parens patriae* does not exclude Philadelphia's representation of its own special interest as a home-rule city and a principal user of the waters of the River. To admit Philadelphia would not create a precedent requiring like permission to other municipalities or private citizens, because none stands in the unique position of Philadelphia as a home-rule city and as a major water consumer.

The Eleventh Amendment of the Constitution is not a bar to Philadelphia's intervention. Philadelphia seeks only the privilege of presenting evidence on its behalf and of participating in the hearings, with no prayer for affirmative relief against the State of New York that might be considered an action against that State within the meaning of the Eleventh Amendment. Philadelphia's intervention, in any event, is directed at another municipality, not located within the watershed of the Delaware River, the City of New York, which is the principal beneficiary and proponent of the petition seeking modification of this Court's decree.

I. The City of Philadelphia Has a Special Interest in This Proceeding Which Justifies Its Intervention and Which Cannot Be Adequately Represented by Pennsylvania

The Petition of the City of Philadelphia to intervene in this proceeding rests upon its special interest as the most populous, riparian municipality on the Delaware River, on

whose waters it is dependent for a daily intake of 200,000,000 gallons, an amount equal to one-half of the water distributed through its municipal system (paragraph 3, Philadelphia's Motion).

From the early days of its history, Philadelphia has drawn upon the waters of the Delaware to supply the needs of its inhabitants.[1] It now operates a vast municipal water and sewage disposal system, valued in excess of $250,000,000 (paragraphs 4 and 5, Philadelphia's Motion), and owns large installations situated along the Delaware which perform these functions.[2] Its rapidly increasing population and industrial growth have required the development of plans for the construction of a new filter plant on the River that will double the City's intake capacity, and it has recognized the need for an upland water supply from the River (paragraphs 12, 13, 14, Philadelphia's Motion).

Pennsylvania's intervention in the original proceeding as of October Term, 1930, No. 16, Original, while based upon its *parens patriae* relationship to all its citizens, rested particularly upon Philadelphia's status as the principal user of Delaware River water.[3]

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1. For example: By the Act of April 6, 1848, P. L. 359, the Commissioners of the Kensington District were authorized to construct water works on the River and reservoirs to store and distribute water to its inhabitants. A similar grant to the Commissioners of the District of Southwark was made by the Act of April 5, 1849, P. L. 344. When these districts were consolidated into the City of Philadelphia by the Act of February 2, 1854, P. L. 21, § 37, the City succeeded to all the right, title and interests of such districts, and, among other things, to all water works, easements and franchises, rights and rights of action.

2. The most important of these installations are: the Torresdale Filtration Plant, originally constructed in 1907, with 4,500 feet of frontage along the River, which processes water for about one-half of the City; the Lardner's Point Pumping Station, begun in 1901, fronting on the River front 650 feet, which pumps water for distribution to about one-fourth of the City; and the Northeast Sewage Treatment Works, begun in 1917 and augmented in 1947, with frontage on the River of 2,600 feet, which treats sewage for about one-third of the City. In addition, two important sewage treatment installations of a total value of approximately $18,000,000 are in the process of construction adjacent to the River.

3. The Special Master thus summarized in his Report part of Pennsylvania's statement of interest (at p. 11): "[It alleged] (2) That a number of municipalities of Pennsylvania obtain their supply of water from the Delaware River and its tributaries and that in the future there will be greater need of water from said River and its tributaries for the supply of municipalities in

When New York City filed the present petition to modify this Court's decree of May 25, 1931, Pennsylvania answered, asserting once more the importance of the Delaware to the City of Philadelphia.[4] In paragraph 5 of its answer to the petition, Pennsylvania juxtaposes Philadelphia and New York City to demonstrate that Philadelphia's needs have increased to a proportionately greater extent than New York City's. And even in its Answer to Philadelphia's Motion, Pennsylvania admits that the population of Philadelphia is more than half that of the entire Pennsylvania watershed of the Delaware (par. 2, p. 4). Yet while admitting Philadelphia's special status as a home-rule city and its greatest user of Delaware River water, Pennsylvania opposes Philadelphia's intervention in this proceeding. While protesting that it "has in no wise neglected or overlooked [Philadelphia's] interests [but] has fostered and protected [them]" (p. 13, Pennsylvania's Memorandum), Pennsylvania vigorously seeks to prevent Philadelphia's efforts to speak for itself.

Philadelphia's sole purpose in intervening in this proceeding is to enable it to participate in the hearings and to present its own evidence as to the present and anticipated requirements of the City. Recognizing that its voice can-

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Pennsylvania; that *in particular the City of Philadelphia*, which at present obtains its water supply from the Delaware River and the Schuylkill River, will have to go to the upper Delaware River and the tributaries of the upper Delaware River for additional water supply and that the application of *the principles set forth in the bill of complaint of New Jersey will prevent the future development of the Delaware River* and its tributaries above tide water *as a source of water supply for Philadelphia* and other Pennsylvania municipalities." (Emphasis supplied)

4. Typical of Pennsylvania's acknowledgment of Philadelphia's status is paragraph 27 of its Answer (at p. 9):

> "27. Further answering, intervenor avers that the City of Philadelphia, which is the third city in population in the United States, has for many years obtained the major part of its water supply from the Delaware River; that the growth of the City has been continuous; and that the City will necessarily depend more and more upon the waters of the Delaware River Basin for its constantly increasing demands for water for domestic, municipal, sanitary, industrial and power purposes. New York City, by its petition, seeks almost to double its diversion of the purest and best water of the entire watershed, the result of which will necessarily be an impairment of the quality as well as a lessening of the quantity of the water of the Delaware River all the way to tidewater."

not prevail in a controversy among states over the control of waters in an interstate river, Philadelphia asks only that it be heard. It seeks for itself no affirmative relief. It asks only that it be permitted to attend and offer what it can at a proceeding in which it is so uniquely concerned. Accordingly, its appeal is that it be afforded the opportunity to present testimony and argument. The result can only be, not harm to any of the parties, but a broadening record of evidence and argument upon which the Special Master and ultimately this Court must determine, on equitable principles, the important rights involved.

Philadelphia is in the unhappy position of not knowing what constitutes Pennsylvania's stream flow regulation policy. Although Pennsylvania has been a member of the Interstate Commission on the Delaware River Basin from the time of its creation, a specially constituted committee appointed by the Governor of Pennsylvania, the Pennsylvania Water Resources Committee, has rejected the plan for the development and utilization of the waters of the Delaware River Basin that was developed after long study by that joint state agency. Pennsylvania has since that time taken no definitive action, and the City of Philadelphia is therefore without any guide as to what the Commonwealth's policy on the Delaware now is or later may be.

In this state of indecision, Philadelphia has no alternative but to ask this Court's leave to appear in this proceeding to present testimony in its behalf. While it does not pretend that it can dictate the river control policy of Pennsylvania, its interest is such that it should be heard. In the light of Pennsylvania's indecision, Philadelphia obviously cannot rely for an adequate presentation of its interest upon Pennsylvania's general representation of all of its citizens as *parens patriae*.

(A) *Pennsylvania's status as parens patriae does not create an exclusive prerogative in the State to represent Philadelphia's interest.*

The intervention of Pennsylvania in the original proceeding before this Court was in its quasi-sovereign capacity as *parens patriae*, an interest "independent of and behind the title of its citizens." *North Dakota v. Minnesota*, 263 U. S. 365, 373 (1923). That interest is not essentially pecuniary or proprietary, but is such as will permit a state to enjoin another state from contaminating an interstate river with sewage, *Missouri v. Illinois and the Sanitary District of Chicago*, 180 U. S. 208, 241 (1901); or to enjoin the construction of cut-off ditches that would cause an interstate river to flood its lands, *North Dakota v. Minnesota, supra;* or to sue a group of railroads for engaging in a rate-fixing conspiracy, *Georgia v. Pennsylvania Railroad Co.*, 324 U. S. 439, 450 (1945); or to enjoin the pollution of its air by a company resident in another state, *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237 (1907).

Any proprietary right of the state in these cases is treated merely as a "makeweight" to its interest as *parens patriae, Georgia v. Pennsylvania Railroad Co., supra,* at p. 450; *Georgia v. Tennessee Copper Co., supra,* at p. 237.

Pennsylvania, New York, New Jersey and the City of New York all contend that this interest of Pennsylvania is supreme over any special interest of Philadelphia and requires that Philadelphia be denied intervention. This Court has never applied so inflexible an exclusionary principle.[5]

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5. In *Kentucky v. Indiana*, 281 U. S. 163, 174 (1929), relied on by New York State, this Court held that defendant citizens who were taxpayers and not a party to the contract there in suit could not contest the state's interpretation of it, although they might contest any relief against them as it affected them individually. *Pennsylvania v. West Virginia*, 262 U.S. 553, 595 (1923), held merely that consumers in the defendant state who would have been benefited by enforcement of the statute under attack were not indispensable parties to the suit for injunction. *Wisconsin v. Illinois*, 279 U. S. 821 (1928), also relied upon by New York State, cannot be taken as more than a discretionary judgment by the Court that in an action involving six states and four of the Great Lakes with their waterways, the city's intervention was not required, since a local sanitary district which included the city was already a defendant.

As to the Commonwealth of Pennsylvania, the City of Philadelphia stands in a special relationship. It is the largest city of the state with over 2,000,000 inhabitants, and has always been dealt with specially as a City of the First Class, in which it stands alone. See *Wheeler v. Philadelphia*, 77 Pa. 338, 350 (1875). The statute, adopted under Article XV, Section 1 of the Constitution of Pennsylvania, the so-called Home Rule Amendment, which endowed Philadelphia with the rights of a home-rule city, is described as the First Class City Home Rule Act (Act of April 2, 1949, P. L. 665, 53 P. S. [Supp.] § 3421.1).

By that Act, the City of Philadelphia was authorized to adopt on the vote of its citizens, a Home Rule Charter which, by the express terms of the statute, is declared to be "the organic law" of the City. (53 P. S. [Supp.] § 3421.11.) The City was authorized to provide in its Charter for the "exercise of any and all powers relating to its municipal functions, not inconsistent with the Constitution of the United States or of this Commonwealth, to the full extent that the General Assembly may legislate in reference thereto." (53 P. S. [Supp.] § 3421.17.)

Under Section 5-800 of the Philadelphia Home Rule Charter, a newly created Water Department is charged with the responsibility of managing all of the water and sewer facilities of the City. Section 5-801 of the Charter requires that the rates and charges for the use of such facilities should be maintained at such a level as to yield to the City at least an amount equal to the operating expenses, interest and sinking fund charges on any indebtedness incurred for such purposes. The impact upon this home rule responsibility of Philadelphia of any control program or lack of control of the waters of the Delaware River is manifest. To the extent that an inadequate flow reduces the City's water supply, or an excess of pollution makes more costly the treatment of that supply, the responsibility of the Water Department to maintain the water and sewage system at an economically self-sustaining level is jeopardized (paragraph 11, Philadelphia's Motion).

Other specific home rule responsibilities are also involved. The Department of Public Health is required to administer public health statutes, ordinances and regulations affecting water and sanitation conditions in the City (paragraph 8, Philadelphia's Motion); the Department of Commerce is required to operate the City's wharf, dock and harbor facilities in the river (paragraph 9, Philadelphia's Motion). These responsibilities would be similarly affected by the condition of the River.

Pennsylvania itself has recognized Philadelphia's special status by granting it the privileges of home rule. Its position in this case as *parens patriae* is not an exclusive prerogative that must bar Philadelphia from appearing in its own behalf, especially where the adequate representation of Philadelphia's special interest is not assured.

(B) *The limited intervention of Philadelphia in this proceeding will not create a precedent for the intervention of other municipalities or private citizens.*

The argument is made *in terrorem* that to admit Philadelphia to this proceeding will establish a precedent for the intervention of other municipalities and private riparian interests (par. 17, p. 5, Pennsylvania's Answer; p. 13, Pennsylvania's Memorandum; p. 3, New York City's Memorandum). Since intervention is controlled by this Court's discretion, no danger exists that a flood of intervenors will pour in behind the City of Philadelphia. No other municipality or private citizen has an interest in the control of the Delaware River comparable to that of Philadelphia. Not only is it the operator of the biggest water supply system on the River, but it is a specially endowed home-rule city of Pennsylvania, both of which considerations warrant its special treatment.

To permit Philadelphia to intervene would, therefore, create no precedent that would impede the disposition of this case or others like it that may arise in the future.

II. The Eleventh Amendment Does Not Prohibit Philadelphia's Intervention

The constitutional objection is raised that Philadelphia's intervention here is forbidden by the Eleventh Amendment because it amounts to a suit against the State of New York without its consent.[6]

In the first place, while nominally requesting the dismissal of New York City's petition, Philadelphia's only purpose in intervening here is not to seek affirmative relief against any of the parties to this proceeding. It asks the limited privilege of participating in the hearings and presenting evidence so that the Court will be assured a full presentation of the facts that will enable it to fashion a decree for the proper control of the waters of the Delaware.[7] And if granted permission to intervene, Philadelphia will, if required, withdraw that portion of its proposed Answer that requests the dismissal of the petition.

But even if Philadelphia were seeking affirmative relief in this proceeding, its efforts would principally affect New York City, which enjoys no Eleventh Amendment protection, *Lincoln County v. Luning*, 133 U. S. 529, 530 (1890); *Port of Seattle v. Oregon & Washington Railroad Co.*, 255 U. S. 56, 71 (1921), and whose petition to modify the decree is the basis of the present proceeding. The chief beneficiary of the petition is the City of New York and not the State. Although because of statutory requirements that define its relationship with the State, New York City had first to seek the State's permission to undertake the project, the real party in interest here is the City rather than the State. Philadelphia's competitive position for the use of Delaware River water relates rather to the City of New

6. Since such immunity from suit is a personal privilege, *Missouri v. Fiske*, 290 U. S. 18, 24 (1933); *Clark v. Barnard*, 108 U. S. 436, 447 (1913), the standing of Pennsylvania and New Jersey to raise this objection is doubtful.

7. Pennsylvania likewise shunned the conventional plaintiff-defendant status when it intervened originally *pro interesse suo*, although it asked for affirmative relief. See the explanation at p. 5 of Pennsylvania's Brief filed, as of Oct. Term 1930, No. 16, Original, by counsel who represent her here.

York than to the State. The proof of this is that if New York City were the only defendant, Philadelphia's position would be unchanged. The Eleventh Amendment, therefore, poses no constitutional objection to the granting of Philadelphia's limited request to intervene.

Moreover, when the role which Philadelphia seeks in this case is carefully examined, it may well be said that its claim of a right to be heard is directed, not against New Jersey or the City or State of New York, but rather against the Commonwealth of Pennsylvania. Pennsylvania appears in this proceeding by leave of this Court, as an intervenor.[8] Since that intervention was granted new circumstances have developed, principally in the growth of Philadelphia and in its changed status within the Commonwealth as a home rule city. These new circumstances, therefore, call upon the intervenor, Pennsylvania, to accord to Philadelphia the opportunity to appear and to be heard as part of Pennsylvania's function in the case. In short, therefore, Philadelphia seeks to appear not as a sovereign, but as an independent part of the Commonwealth of Pennsylvania and therefore seeks to carve out of the intervention already granted to Pennsylvania, the right to be heard. Thus viewed, Philadelphia's motion to intervene can present no problem of lack of sovereignty preventing suit against a sovereign state. What is involved is merely subordinate representation among the sovereign parties.

CONCLUSION

Philadelphia does not pretend that its special interest as the largest municipal water supplier on the Delaware and the only home rule city riparian to it entitles this City to dictate the water policy of Pennsylvania. It maintains only that because of the extent of this special interest, Pennsyl-

8. Pennsylvania's original motion to intervene was made without any assertion of interest or statement of relief desired. The Court granted the motion "upon the condition that the State of Pennsylvania shall file a statement of her interests in this cause, and of the relief, *if any*, which she seeks". *State of New Jersey v. State of New York*, 280 U. S. 528, 529 (1929).

vania's intervention as *parens patriae* does not afford an adequate vehicle to represent this interest. It urges, therefore, that this Court should have before it all the interests involved. It appeals to the discretion of this Court, whose responsibility it is to achieve a fair and equitable apportionment of the waters of this interstate river, to admit it for the sole purpose of participating in the hearings and presenting evidence.

The City of Philadelphia therefore urges that its motion for leave to intervene should be granted.

Respectfully submitted,

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